84

(2)

No. 07-828

Supreme Court, U.S.
FILED
FEB 25 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SPARTON TECHNOLOGY, INCORPORATED,

Petitioner,

v.

NATIONAL RURAL
TELECOMMUNICATIONS COOPERATIVE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

JEFFREY P. AIKEN
Counsel of Record
ERIC J. MEIER
WHYTE HIRSCHBOECK DUDEK S.C.
555 East Wells Street
Suite 1900
Milwaukee, WI 53202-3819
(414) 978-5413

Attorneys for Respondent

214321

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether this Court should review the purely state law question of whether, under Tennessee law, a jury's verdict finding of a contract precludes a damage award based on promissory estoppel concerning the same subject matter?

LIST OF PARTIES

National Rural Telecommunications Cooperative ("NRTC") is a District of Columbia cooperative corporation. It is not a stock corporation, does not have a publicly-held or private parent corporation, and does not issue publicly or privately-traded securities. Util-Link has ceased active business operations and for purposes of this action, it was stipulated that Util-Link was acting as the agent of NRTC.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Cited Authorities	iv
Introduction	1
Statement of the Case	3
Reasons for Denying the Petition	6
I. Sparton Erroneously Seeks Application Of The "Waiver" Rule Under Fed. R. Civ. P. 49(b) To The Verdict In This Case.	6
II. Sparton Erroneously Asserts It Was Denied A Jury Determination On Its Promissory Estoppel Claim In Violation Of The Seventh Amendment.	9
Conclusion	12

TABLE OF CITED AUTHORITIES

Page

Cases:

Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020 (9th Cir. 2003) 7

United States Constitution:

Seventh Amendment 9, 11

Rules:

Fed. R. Civ. P. 49(a) 7

Fed. R. Civ. P. 49(b) ..... *passim*

Other Authorities:

1B Federal Procedural Forms *Actions in District Court* § 1:1372-1375, 1399 (Lawyers. Ed. 1993) 7

INTRODUCTION

Petitioner Sparton Technology, Inc., ("Sparton") concedes that this diversity case is a "straightforward commercial lawsuit." (Pet. App. at 4-5.) Despite its effort to now paint this garden-variety case with a Constitutional brush, Sparton never raised any Constitutional issues or arguments with the trial court or the Sixth Circuit. On that basis alone, this Court can and should dismiss Sparton's Petition.

Even setting aside the obvious waiver issue, a simple review of the Sixth Circuit's Opinion illustrates the drastic efforts Sparton takes to manufacture a Constitutional issue where none exists. This case revolves around matters of Tennessee law, which the parties specified in their agreement and at trial to be controlling. (Pet. App. at 9a.) Specifically, the Sixth Circuit addressed the question of what effect a jury finding of an existing contract has on a promissory estoppel claim concerning the same subject matter, holding that a contract finding precludes estoppel damages under Tennessee law. (Pet. App. at 13a.)

Sparton presented essentially the same arguments regarding Rule 49(b) and waiver to the Sixth Circuit that it now presents to this Court, albeit without Constitutional underpinnings. In response, the Sixth Circuit stated that Sparton's waiver arguments were "plainly without merit" and that "Rule 49(b) is inapplicable to this case." (Pet. App. at 13a.) The issue, as correctly noted by the Sixth Circuit, was not with a rogue jury ignoring its instructions and the verdict form. Rather, the problem stemmed from the jury following technically incorrect instructions which permitted an estoppel verdict after finding a contract existed. (*Id.*)

The Sixth Circuit's remedy for the District Court's error was to reverse the estoppel judgment and remand for entry of judgment in Respondents' favor. (Pet. App. at 21a.) Applying the Sixth Circuit's correct holding regarding Tennessee law to the undisturbed jury finding of a contract, and it would have been improper for the Sixth Circuit to remand the case for a new trial as Sparton requests. First of all, there has already been a jury trial on the estoppel claims. More importantly, the jury's contract finding precluded any estoppel award as a matter of Tennessee law. By reversing and remanding, the Sixth Circuit excised the impact of the problematic estoppel instructions and verdict by disallowing answers to verdict questions that should never have been responded to in the first instance.

This is not a proper case to explore waiver issues under Rule 49(b). Nor, is this a case involving a deprivation of a right to trial. Rather, this is a case that involves a limited issue of proper application of Tennessee state law. As Sparton has failed to carry its burden of demonstrating that there are any compelling reasons for this Court to grant the Petition, it should be denied.

STATEMENT OF THE CASE

The Sixth Circuit Opinion presents a detailed summary of the factual and procedural background of the case leading up to its decision. (Pet. App. at 2a – 8a.) Without unnecessarily repeating that summary or the facts presented within Sparton's Statement of the Case, Respondents seek to highlight the following case history for the Court's consideration:

1. The focus of the Sixth Circuit's Opinion was on the relationship between three counts asserted within Sparton's Amended Complaint: (a) Count 1—breach of a contract to purchase 35,000 additional LINK units; (b) Count 4—promissory estoppel regarding the additional 35,000 LINK units; and (c) Count 5—equitable estoppel regarding the additional 35,000 LINK units. (Pet. App. at 5a.) The estoppel claims were pled as alternatives to the breach of contract claim. (*Id.*) Sparton continued to acknowledge the alternative nature of its claims throughout the case. (Pet. App. at 16a.) The Sixth Circuit further noted that the contract and estoppel claims dealt "with the same terms and scope and, in fact, seek damages in identical amounts for identical alleged losses." (*Id.*)

2. On or about September 2, 2004, the District Court dismissed Sparton's estoppel claims when it granted part of Respondents' summary judgment motion. The estoppel claims remained out of the case until the middle of the trial that started in September of 2005. (Pet. App. at 6a.) The reintroduction of the estoppel claims was prompted by the District Court inviting a motion from Sparton; a motion opposed by Respondents. (*Id.*)

3. Throughout the trial and formulation of the verdict and associated instructions, Respondents objected to the inclusion of the estoppel claims. (Pet. App. 13a; R. 176, JA at 1035-1036; R. 126; JA at 545-547.) Respondents argued that a finding of an express contract would preclude any consideration of estoppel premised on the same subject matter. Respondents also argued that an estoppel claim could only be maintained with respect to a transaction to which the statue of frauds does not apply. Despite Respondents' objections, the Court instructed the jury otherwise. (R. 195; JA at 1057-1059.)

4. After the jury verdict, Respondents timely filed a motion for judgment as a matter of law ("JMOL") and/or a new trial. (Pet. App. at 7a.) Among the arguments raised was the preclusive effect of the jury's contract finding on the estoppel claims. (*Id.*) Neither party challenged in any fashion the jury's finding that a contract existed for additional LINKs or that it was not breached. Nor, did Sparton request that the District Court enter judgment in its favor on the contract claim or order a new trial regarding it. Sparton instead focused on upholding the award of damages on its estoppel claim without any objection to the jury's contract findings. (R. 139; JA at 671-692.)

5. The District Court denied Respondents' JMOL motion on the estoppel claims, holding that "[t]here is no need for the court to involve itself in the esoterica of the right of plaintiff to assert both a contract and an estoppel [claim], whether when there is a contract which binds the parties, a party may not rely on an estoppel." (Pet. App. at 7a.)

6. While the District Court denied Respondents' motions, it held that the amount of the jury's estoppel award was unsustainable. (Pet. App. at 46a – 48a.) Sparton was thus presented with an option to either accept a remittitur or be permitted a new trial on its estoppel claims. (*Id.*) Sparton chose to accept the reduced amount and judgment was entered accordingly. (R. 151; JA at 741-743.)

7. NRTC timely filed a Notice of Appeal with the Sixth Circuit and presented several issues, including whether "uncontested jury findings that a contract existed and was not breached preclude judgment on the alternative promissory estoppel claims?" (C.A. Appellants' Br. at 2.) As its requested relief, Respondents sought to have the Sixth Circuit reverse the estoppel judgment. (C.A. Appellants' Br. at 37.) Nowhere in any of Sparton's filings with the Sixth Circuit did it ever raise a Constitutional argument in opposition to Respondents' arguments or requested relief.

8. After briefing and oral argument by the parties, the Sixth Circuit panel (which included an active Tennessee federal judge sitting by designation) issued its decision on September 21, 2007. (Pet. App. at 1a.) The Sixth Circuit held that "the jury's finding that a contract for the manufacture and purchase of the additional LINKs existed precludes, as a matter of law, a damage award based on promissory estoppel concerning the same subject matter . . . " (Pet. App. at 13a.) It went on to explain why it rejected Sparton's arguments regarding: (a) the asserted waiver of Respondent's right to object to the jury instructions and verdict; (b) application of Fed. R. Civ. P. 49(b); and (c) Tennessee law relating to contract and estoppel claims on the same subject matter.

9. The Sixth Circuit concluded that the District Court should have granted Respondents' JMOL and ordered Sparton's promissory estoppel judgment be reversed and vacated. (Pet. App. 16a-17a, 21a.) As the jury's contract verdict remained in tact, the Sixth Circuit could not remand the case for a new trial on Sparton's promissory estoppel claims. To do so would have contravened the very Tennessee law giving rise for the reversal. Instead, it corrected the error by removing that portion of the jury verdict which should have never been answered by the jury in the first instance.

10. Sparton's Petition contains a few mischaracterizations and misstatements of fact – none of which are determinative of issues currently before this Court.

REASONS FOR DENYING THE PETITION

I. Sparton Erroneously Seeks Application Of The "Waiver" Rule Under Fed. R. Civ. P. 49(b) To The Verdict In This Case.

In opposition to Respondents' Sixth Circuit brief, Sparton maintained that the verdict at issue was a general verdict with interrogatories, and thus subject to Fed. R. Civ. P. 49(b). Applying this rule, Respondents were required to timely object to any problems with jury instructions or the verdict form. Sparton contended that having failed to present timely objections, Respondents waived any opportunity to later object to the instructions or verdict.

A fundamental requirement for application of Rule 49(b) is the verdict must be a "general verdict with answers to written questions." "Special verdicts" are different and governed by Rule 49(a). "[T]he theoretical distinction between general and special verdicts is that general verdicts require the jury to apply the law to the facts, and therefore require legal instruction, whereas special verdicts 'compel the jury to focus exclusively on its fact finding role.' Black's defines a general verdict as 'a verdict whereby the jury find either for the plaintiff or for the defendant in general terms.' Thus in a general verdict the jury announces only the prevailing party on a particular claim, and may announce damages." *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1031 (9th Cir. 2003)(citations omitted).

The distinction between the types of verdict forms is important because Sparton's waiver argument applies only to Rule 49(b). Yet, Sparton has never been able to identify what portions of the verdict constitute the general verdict questions as opposed to the interrogatories. A general verdict would have called upon the jury to find for Sparton regardless of the legal theory. *See, e.g.*, 1B Federal Procedural Forms *Actions in District Court* § 1:1372-1375, 1399 (Lawyers. Ed. 1993). Quite simply, the verdict in this case bears no resemblance to any commonly recognized forms of general verdict. (Pet. App. 55a - 60a.) Given the verdict was "special," Rule 49(b) and any waiver arguments do not apply.

The Sixth Circuit addressed Sparton's arguments by first holding that "Rule 49(b) is inapplicable to this case." (Pet. App. 13a.) The Sixth Circuit focused on the

jury correctly following the instructions through the verdict form. (Pet. App. at 13a.) "If the jury had been correctly instructed that it should not consider the promissory estoppel claim if it first found a contract, the inconsistency would not have occurred." (*Id.*) In other words, while the verdict was technically inconsistent under Tennessee law, it was consistent with the procedure that the jury was instructed to follow. (*Id.*)

Even assuming that Rule 49(b) applied to the verdict, the Sixth Circuit explained that Respondents did not waive their objections to the flaws in the jury instructions and verdict prior to their submission to the jury. (Pet. App. at 13a.) "The record in this case clearly establishes that NRTC objected numerous times to the inclusion of the promissory estoppel instructions in the jury instructions and did so just prior to the submission of the case to the jury." (*Id.*) Thus, Sparton's waiver argument was "plainly without merit." (*Id.*)

Sparton finally contends that an objection by Respondents to the jury verdict after it was rendered could have been cured by "appropriate action" by the District Court, yet fails to provide any explanation as to what such action might have been. (Pet. App. at 29.) Part of Sparton's problem of proof is that, looking at the contract and estoppel claims in isolation, there were no inconsistencies between the jury's responses and the verdict. Rather, the problem was the irreconcilability of the contract and estoppel findings as a matter of Tennessee law.

The Sixth Circuit understood that there was nothing that could have been cured by Respondents objecting after the verdict, stating that "[g]iven the jury instructions, objected to by NRTC, it would have been fruitless for NRTC to seek to have the jury return for further consideration of its answers. We find no merit to this argument." (*Id.* at 13a-14a.) The jury simply was not in a position to address the legal problem of inconsistent claims ultimately fixed by the Sixth Circuit.

As explained by the Sixth Circuit, Sparton's Rule 49(b) and related waiver arguments are without merit. They have not since improved with age or through presentation to this Court. Nor, have they morphed into issues of Constitutional magnitude that justify granting Sparton's Petition.

II. Sparton Erroneously Asserts It Was Denied A Jury Determination On Its Promissory Estoppel Claim In Violation Of The Seventh Amendment.

Sparton's argument that it was deprived its Seventh Amendment right to a jury trial on its promissory estoppel claim drips with irony. Over a year before the start of trial, Sparton had voluntarily agreed to dismiss its estoppel claims. (Pet. App. at 16.) Prior to the execution of the stipulation, the District Court dismissed the estoppel claims on Respondents' summary judgment motion. (*Id.*) If not for the District Court's judicial activism during the middle of trial, the estoppel claims would not have been presented to the jury at all. (Pet. App. at 17.)

Respondents objected to the re-introduction of the estoppel claims during the trial and continued to object to inclusion of estoppel jury instructions and verdict questions. Yet, over such objections, the District Court provided them to the jury. Had the jury received a proper verdict form and instructions, it would have stopped its answers after it found the existence of a contract with no breach. Instead, as a result of the District Court's error, Sparton received an estoppel verdict to which it was not entitled.

Sparton asserts that the only thing the Sixth Circuit could have done to remedy the error with the estoppel damage award was to remand the matter for a new trial on Sparton's estoppel claim. (Pet. App. at 39.) This position is nonsensical given that Sparton had previously chosen to accept remittitur over a new trial on its estoppel claims. More importantly, the controlling state law, as found by the Sixth Circuit, barred Sparton's estoppel claim as a matter of law. (Pet. App. at 12a-13a.)

For Sparton to further argue that the contract and promissory estoppel claims did not relate to the same subject matter, but instead, presented "two different questions" is disingenuous. In fact, as with Sparton's other arguments, the Sixth Circuit noted that "Sparton's own pleadings illustrate the lack of merit in Sparton's position." (Pet. App. at 16a.) The Sixth Circuit referred to Sparton's repeated presentations of these claims in the alternative, and specifically stated that both claims dealt with the same terms and scope and, in fact, sought damages in identical amounts for identical alleged losses. (*Id.*) Sparton was likewise unable to present the Sixth Circuit with any case citation which permitted a recovery

on a promissory estoppel claim where the dispute involved the terms of an express contract. (*Id.*) That failure extends to Sparton's Petition to this Court.

Sparton's attempts to cloak the Sixth Circuit's actions in Constitutional fabric are strained. The Sixth Circuit recognized that the problem with the estoppel damage award stemmed from the estoppel jury instructions and verdict, not the unchallenged contract findings. The instruction and verdict problems permitted the jury to answer more verdict questions than appropriate. The result was Sparton receiving a jury trial on issues to which it was not entitled. Given that Tennessee law precludes estoppel claims upon a finding that a contract existed covering the same subject matter, the Sixth Circuit avoided the problem Sparton seeks to create with its Petition, by reversing the estoppel judgment and remanding for entry of judgment in Respondents favor. This reasoned approach does not interfere with Sparton's Seventh Amendment rights, but rather, reflects a proper and pragmatic method of rectifying the District Court's error.

CONCLUSION

The Sixth Circuit's decision in this case was correct. Sparton's arguments regarding the application of Fed. R. Civ. P. 49(b) are off-base, as are its claims of waiver. The Sixth Circuit holding at issue is a narrow one involving application of Tennessee law, not matters of Constitutional importance. As Sparton presents no compelling reason for this Court to grant its Petition, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

JEFFREY P. AIKEN
Counsel of Record
ERIC J. MEIER
WHYTE HIRSCHBOECK DUDEK S.C.
555 East Wells Street
Suite 1900
Milwaukee, WI 53202-3819
(414) 978-5413

Attorneys for Respondent